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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1316

UNITED MINE WORKERS OF AMERICA,
Petitioner,
v.
RIVERTON COAL COMPANY and
DAVISON FUEL AND DOCK COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS AND FEDERAL RULE INVOLVED	4
STATEMENT OF THE CASE	4
A. Kind of Action and the Judgments of the District Court and the Sixth Circuit	4
B. Facts and the District Court's Findings and Conclusions Concerning UMW's Restrictions on Subcontracting	6
1. The Litigants and Their Activities	6
2. The History of Collective Bargaining in, and Relevant Economic Facts of, the Bituminous Coal Industry	9
3. UMW's Historical Efforts to Preserve Work Opportunities for its Members Through Contractual Restrictions	11
4. The District Court Found and Concluded that PWC, the 80-cent Clause and the Coal Lands Clause of the 1964 and 1966 Agreements Sought to Protect the Jobs and Work of Signatory Employees and to Maintain the Welfare Fund's Integrity, and Were Permissive Under the Act's Section 8(e)	13

Page

5. The District Court's Conclusions Concerning the Validity of the Challenged Clauses 15

C. Facts and the District Court's Findings and Conclusions Concerning the 1964 and 1966 Work Stoppages 16

1. The 1964 Work Stoppage 16

2. The 1966 Work Stoppage 22

3. The District Court's Conclusions Concerning the 1964 and 1966 Work Stoppages 24

D. The Sixth Circuit's Opinion and Judgments 26

1. As to the Challenged Clauses 26

2. As to the Work Stoppages 27

a. The 1964 stoppage and its purpose 27

b. The 1966 stoppage 29

3. As to Damages 30

4. As to Davison 30

E. Pursuant to the District of Columbia Circuit's Indicia, NLRB Has Sustained the Validity of PWC and the 80-cent Clause as Permissive Under Section 8(e) 31

1. NLRB Has Validated PWC 31

2. NLRB Has Validated the 80-cent Clause 32

REASONS FOR GRANTING THE WRIT 34

A. The Sixth Circuit's Holdings Concerning the Challenged Clauses Conflict with Prior Im-

Page

portant Decisions and Principles of This Court, the District of Columbia Circuit and NLRB ... 34

B. The Sixth Circuit's Reversal of the District Court's Findings That the Challenged Clauses Were Permissive Under the Act's Section 8(e) Conflicts with Rule 52(a), Federal Rules of Civil Procedure ... 40

C. The Sixth Circuit's Holdings with Reference to UMW's Responsibility for the Work Stoppages Contravene Prior Important Decisions and Principles of This Court and Other Federal Courts, Including Prior Decisions of the Sixth Circuit ... 40

1. The 1964 stoppage ... 41

2. The 1966 stoppage ... 43

D. The Sixth Circuit's Holding That Davison Is A Proper Party to the Instant Action Is Erroneous 47

CONCLUSION ... 50

TABLE OF CASES

Page

Bale v. *Glasgow Tobacco Bd. of Trade, Inc.*, 6 Cir., 339 F.2d 281, 287 ... 40

Browning v. *Crouse*, 10 Cir., 356 F.2d 178 ... 43

Busby v. *Electric Util. Employees' Union*, D.C. Cir., 147 F.2d 865 ... 46

C. & O. Ry. Co. v. *Martin*, 283 U.S. 209, 219-20 ... 43

Page

Comm'r of Internal Revenue v. *Duberstein*, 363 U.S. 278, 291 40

Coronado Coal Co. v. *UMWA*, 268 U.S. 295, 304-05 ..... 6, 22, 25, 41, 42

Dixie Mining Co. Pet. v. *NLRB, Resp. and W. A. Boyle, et al., Intervenors*, Case No. 23,947 in the District of Columbia Circuit (pending) 39

Fibreboard Paper Prods. Corp. v. *NLRB*, 379 U.S. 203 (1964) 29, 36

Franklin Electric Construction Cooperative, 121 NLRB 143, 145-46 46

Garmeada Coal Co. v. *Int. Union, UMWA*, 6 Cir., 230 F.2d 945, affirming 122 F.Supp. 512, 518 ..... 6, 46

General Electric v. *Sciaky Bros.*, 6 Cir., 415 F.2d 1068 40

Goldlawr v. *Heiman*, 369 U.S. 463 (1962) 47

Great Northern Ry. Co. v. *Delmar Co.*, 283 U.S. 686, 691 (1931) 36

Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) 39

Harnischfeger Corp. v. *Sheet Metal Workers, etc.*, 6 Cir., 436 F.2d 351, 355 (1970) 41, 42, 45, 46

Int. Bro. of Teamsters v. *Humko*, 6 Cir., 287 F.2d 231 46

Int. Ladies Garment Workers Union v. *NLRB*, D.C. Cir., 237 F.2d 545, 551, 552 ..... 41, 42, 44

Int. Union, UMWA, et al., 165 NLRB 467, 468 (1967) 33

Int. Union, UMWA, et al., 188 NLRB No. 121, 76 LRRM 1394, 1395, 1396 (February 26, 1971) 26, 34, 38, 39

Page

Int. Union, UMWA, et al., Pet. v. *NLRB, Resp. and Dan S. Davison, et al., Intervenors,* Case No. 21, 129 in the District of Columbia Circuit (pending) 39

Int. Union, UMWA v. *NLRB, et al.,* D.C. Cir., 399 F.2d 977, 980 (1968) 33, 39

Lewis, et al. v. *NLRB,* D.C. Cir., 350 F.2d 801 (1965) 31, 32, 39

Local 357, Teamsters v. *NLRB,* 365 U.S. 667, 676 (1961) 36

Moore v. *C. & O. Ry. Co.,* 340 U.S. 573, 578 43

Morgan Driveway, Inc. v. *Teamsters,* 7 Cir., 268 F.2d 871 (1959) 46

NLRB, Pet. v. *BCOA, Resp. and Int. Union, UMWA, et al., Intervenors,* Case No. 21, 226 in the Distric of Columbia Circuit (pending) 39

NLRB v. *Marshall Car Wheel, etc.,* 5 Cir., 218 F.2d 409, 417 42

NLRB v. *Miami Coca-Cola Bottling Co.,* 5 Cir., 222 F.2d 341 42

NLRB v. *News Syndicate Co.,* 365 U.S. 695 (1961) 36

NLRB v. *Truck Drivers Local No. 449, Teamsters,* 353 U.S. 87 (1957) 37

National Woodwork Mfgrs. Assn. v. *NLRB,* 386 U.S. 612, 619-25, 632, 644, 645, 646 (1967) 36, 37, 38

Pennsylvania R. Co. v. *Chamberlain,* 288 U.S. 333, 340-41 43

Page

Raymond O. Lewis, et al., 144 NLRB 228 (August 27, 1963) 13, 31

Raymond O. Lewis, et al., 148 NLRB 249, 255, (1964) 31, 32

Retail Clerks Union, Local 770 v. *NLRB*, D.C. Cir., 296 F.2d 368, 374 (1961) 38

Riverton Coal Company and Davison Fuel and Dock Company, Plaintiffs-Appellants v. *United Mine Workers of America, Defendant-Appellee*, Case No. 71-1021, 6 Cir., 453 F.2d 1035 (January 21, 1972) 1, 2, 3, 4, 5, 6, 26, 27, 28, 29, 30, 31, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50

Riverton Coal Company and Davidson Fuel and Dock Company, Plaintiffs-Appellees v. *United Mine Workers of America, Defendant-Appellant*, Case No. 71-1022, 6 Cir., 453 F.2d 1035 (January 21, 1972) 2, 3, 4, 5, 6, 26, 27, 28, 29, 30, 31, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50

T. S. Ragsdale Co., Inc., v. *General Drivers, etc., Local No. 509, and Int. Bro. of Teamsters*, DC, D. S.C., 1972, F. Supp. , 79 LRRM 2219, 2222, 2223 46

Teamsters, Local 710 v. *NLRB*, D.C. Cir., 335 F.2d 709, 713-14 (1964) 37, 38

UMWA v. *Coronado Coal Co.*, 259 U.S. 344, 371, 387, 391, 394, 395, 66 L Ed. 975, 981 ..... 6, 22, 25, 41, 42, 44, 45, 46

UMW v. *Gibbs*, 383 U.S. 715, 739, 743 ..... 21, 44

Page

UMW v. *Osborne Mining Co.*, 6 Cir., 279 F.2d 716, 727-29 (1960) 48, 49

United Construction Workers v. *Haislip Baking Co.*, 4 Cir., 223 F.2d 872, 877 42

U. S. v. *White*, 322 U.S. 694 41

W. A. Boyle, et al., 179 NLRB No. 80, 72 LRRM 1426, 1428-29 (1969) 32

Walters v. *Int. Assn. of Plumbers*, 6 Cir., 323 F.2d 578 42

STATUTES

Labor Management Relations Act, 1947, as amended:

Section 2 (29 USCA 152) 4, 5

Section 2(13) [29 USCA 152(13)] 4, 41

Section 8(b) [29 USCA 158(b)] 4, 5

Section 8(b)(4) [29 USCA 158(b)(4)] 27, 34, 35, 36, 38

Section 8(b)(4)(i)(ii)(A) and (B) [29 USCA 158(b)(4)(i)(ii)(A) and (B) 3, 4, 6, 25, 34, 35

Section 8(d) [29 USCA 158(d)] 4, 29

Section 8(e) [29 USCA 158(e)] 3, 4, 5, 13, 14, 31, 32, 34, 35, 36, 37, 38, 39

Section 301 (29 USCA 185) 4, 16, 29

Section 301(e) [29 USCA 185(e)] 4, 6, 25, 41

Section 303 (29 USCA 187) 3, 4, 5, 27, 42, 45, 49

Section 303(a) [29 USCA 187(a)] 4

Section 303(b) [29 USCA 187(b)] 4, 5, 47

Page

28 USCA 1254(1) 2

28 USCA 2101(c) 2

RULE

Federal Rules of Civil Procedure:
Rule 52(a) 3, 4, 26, 40

MISCELLANEOUS

73 Harvard Law Rev. 1086, 1119 39

Legislative History of the Labor Management Relations Act, 1947 (Government Printing Office, 1948):
p. 1204 41, 42
Vol. II, p. 1627, 93 Congressional Record, A. 3233 42

62 Mich. L. Rev. 1176, 1187 (May, 1964) 39

INDEX TO APPENDICES

APPENDIX A:

Opinion of the United States District Court for the Southern District of Ohio, Western Division, filed October 8, 1970 1a

Final Judgment of the United States District Court for the Southern District of Ohio, Western Division, filed October 26, 1970 61a

Page

APPENDIX B:

Opinion of the United States Court of Appeals for the Sixth Circuit, decided and filed January 21, 1972 ..... 64a

Judgment of the United States Court of Appeals for the Sixth Circuit in Case No. 71-1021, filed January 21, 1972 ..... 78a

Judgment of the United States Court of Appeals for the Sixth Circuit in Case No. 71-1022, filed January 21, 1972 ..... 79a

APPENDIX C:

Labor Management Relations Act, 1947, as amended:

29 USCA 152(13) [Section 2(13) of the Act] 81a

29 USCA 158(b) (4) [Section 8(b) (4) of the Act] 81a

29 USCA 158(d) [Section 8(d) of the Act] 82a

29 USCA 158(e) [Section 8(e) of the Act] 84a

29 USCA 185(e) [Section 301(e) of the Act] 85a

29 USCA 187 [Section 303 of the Act] 85a

APPENDIX D:

73 Harvard Law Review 1086, 1119 87a

62 Michigan Law Review 1176, 1187 (May, 1964) 87a

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No. .....

UNITED MINE WORKERS OF AMERICA,
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v.

RIVERTON COAL COMPANY and
DAVISON FUEL AND DOCK COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner United Mine Workers of America prays that a Writ of Certiorari issue to review:

1. The Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered January 21, 1972 in Case No. 71-1021, styled *Riverton Coal Company and Davison Fuel and Dock Company, Plaintiffs-Appellants* v. *United Mine Workers of America, Defendant-Appellee;* and

2. The Judgment and Opinion of said United States Court of Appeals also entered January 21, 1972 in Case No. 71-1022, styled *Riverton Coal Company and Davison*

Fuel and Dock Company, Plaintiffs-Appellees v. *United Mine Workers of America, Defendant-Appellant.*[1]

The Sixth Circuit remanded the cases to the district court for entry of judgment in plaintiffs' favor for $150,312.50, with interest and costs.

Petitioner has requested the Sixth Circuit to transmit to this Court a certified record in said cases, together with proceedings in said Sixth Circuit.

OPINIONS BELOW

The district court's Opinion appears in Appendix A hereto (A. 1-60a), in the certified record and is reported in 79 LRRM 2348. The Sixth Circuit's Opinion appears in Appendix B hereto (A. 64-78a), in the certified record and is reported in 453 F.2d 1035.[2]

JURISDICTION

Judgments of the Sixth Circuit in both Cases Nos. 71-1021 and 71-1022 were entered on January 21, 1972. This Petition for Certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USCA 1254(1) and 2101(c).

QUESTIONS PRESENTED

1. Where, in an action brought by a coal producer against a labor union, both signatories to collective bar-

[1]Herein the United States Court of Appeals for the Sixth Circuit is called "*Sixth Circuit*"; the United States District Court for the Southern District of Ohio, Western Division, "*trial court*" or "*district court*"; Riverton Coal Company, "*Riverton*"; Davison Fuel and Dock Company, "*Davison*"; collectively Riverton and Davison are called "*plaintiffs*"; and United Mine Workers of America, "*UMW*" or "*petitioner*".

Unless otherwise indicated, all emphases are supplied.

[2]Though separate Judgments were entered in said cases by the Sixth Circuit (A. 78-80a), the Sixth Circuit issued a single Opinion covering both Cases Nos. 71-1021 and 71-1022.

gaining agreements in the bituminous coal industry, for damages under Section 303 of the Labor Management Relations Act, 1947, as Amended,[3] charging a violation of secondary activity thereunder and under the Act's Section 8(b)(4)(i)(ii)(A) and (B), and Section 8(e), by unlawfully coercing the signatory coal producer by strike action into signing the agreements, and a district court found and concluded that clauses in said labor agreements were work preservation clauses and therefore primary and permissive under the Act's Section 8(e), based upon undisputed facts relating to said industry's collective bargaining history and economic facts and the labor organization's historical efforts through contractual restrictions to preserve work opportunities for its members, did the Court of Appeals commit reversible error in holding that the clauses involved secondary activity banned under Section 8(e) because some coal purchased as supplemental coal from nonsignatory suppliers involved some work never performed by the coal producer's own employees, so that the challenged clauses were addressed to nonsignatory suppliers and not to the labor relations of the contracting employer's own employees?

2. Did the Court of Appeals commit reversible error when, in reversing the district court's findings and conclusions relating to the challenged clauses, it failed to find that such findings were clearly erroneous pursuant to the command of Rule 52(a), Federal Rules of Civil Procedure?

3. Under applicable law and the substantial evidence in the record, did the Court of Appeals commit reversible error in holding that UMW was responsible for the 1964 and 1966 work stoppages?

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[3]Called "Act".

4. Did the Sixth Circuit commit reversible error in holding that Davison is a proper party plaintiff to the instant actions under the Act's Section 303(b)?

5. Was there substantial evidence, under applicable law, to warrant the Court of Appeals' holdings and judgments that the defendant union had committed unfair labor practices under the Act's Sections 8(b)(4)(i), (ii)(A) and (B), 8(e) and 303 and its award of damages under the Act's Section 303?

STATUTORY PROVISIONS AND FEDERAL RULE INVOLVED

Statutory provisions involved are Sections 2, 2(13), 8(b), 8(b)(4)(i)(ii)(A) and (B), 8(d), 8(e), 301, 301(e) and 303(a) and (b) of the Labor Management Relations Act, 1947, as Amended [29 USCA 152, 152(13), 158(b), 158(b)(4)(i)(ii)(A) and (B), 158(d), 158(e), 185, 185(e) and 187(a) and (b)] (called "Act"); as well as Rule 52(a), Federal Rules of Civil Procedure.

Relevant statutory provisions appear in Appendix C hereto (A. 81-86a).

STATEMENT OF THE CASE

A. KIND OF ACTION AND THE JUDGMENTS OF THE DISTRICT COURT AND THE SIXTH CIRCUIT.

Riverton and Davison sued UMW for damages under the Act's Section 303, charging UMW committed unfair labor practices under the Act's Section 8(b)(4)(i)(ii)(A) and (B) and Section 8(e) by unlawfully coercing Riverton by strike action into signing the National Bituminous Coal Wage Agreement of 1950, As Amended Effective April 2, 1964 and April 1, 1966, respectively, containing the "Application of Contract to Coal Lands"

clause and the 80-cent Welfare Fund clause [A. 1-2a (32)].[4]

UMW denied (1) liability, (2) damages, and (3) that Davison fell within the scope of the Act's Section 303(b)'s term "Whoever" so as to be entitled to recover for any alleged injury [A. 2a (32)]. The case was tried by the district court without a jury.[5] In an October 26, 1970 Judgment, the district court was of opinion, from Findings of Fact and Conclusions of Law, that Riverton and Davison "failed to establish their alleged causes of action" against UMW under the cited statutes, ordered plaintiffs' actions dismissed with prejudice and taxed costs against plaintiffs in favor of UMW [A. 61-63a (89-90)].

The district court's judgment was based upon, *inter alia*, its conclusions that the 80-cent and coal lands clauses of the 1964-1966 Contracts did not violate the Act's Section 8(e). Plaintiffs' appeal was considered by the Sixth Circuit in Case No. 71-1021.

UMW filed a notice of appeal and cross-appeal insofar as the district court's conclusions of law and findings of fact provided that "if there be a reversal on liability" and "If the 80-cent clause did violate 8(e)" and the appellate court so held, plaintiff should recover damages from UMW, and insofar as the district court found and concluded that Davison is an employer "within the meaning of" 29 U.S.C. 152 and 187, and an affiliate of Riverton and "as such is includible within the meaning of the word 'whoever' " in Section 187 and entitled to assert damages thereunder and Section (b) of 29 U.S.C. 158; and insofar

---

[4]The abbreviation "A. ... a" refers to the Appendix to the Petition for Certiorari, while page references enclosed in parentheses refer to the Joint Appendix or to the Supplemental Appendix, both filed in the Sixth Circuit and in this Court's Clerk's office as a part of the certified record herein.

[5]United States District Judge Timothy S. Hogan presided at the trial.

also as the district court found and concluded that UMW in 1964 induced and encouraged Riverton employees "to engage in a strike and a refusal to perform services for Riverton in the course of their employment and also threatened, coerced and restrained Riverton, as those words are used in 8(b)(4)(A) and (B)", that "In concluding that the 1964 strike was union-authorized, we have applied *Coronado*, as modified by 29 U.S.C. §185(e) [see *Garmeada*, 122 F.Supp. 512 (E.D. Ky. 1954) at 517] and have applied that subsection, i.e., 29 U.S.C. §185(e)", and that "plaintiff has shown by a preponderance that the defendant, through its District 17, authorized the 1964 strike" (J.A. 91-92).

UMW's appeal was considered by the Sixth Circuit in Case No. 71-1022.

On January 21, 1972, the Sixth Circuit, in each of said cases, reversed the district court's judgment and remanded the case to the district court for entry of a judgment in favor of plaintiffs for $150,312.50, plus interest and costs (A. 78-80a).

B. FACTS AND THE DISTRICT COURT'S FINDINGS AND CONCLUSIONS CONCERNING UMW'S RESTRICTIONS ON SUBCONTRACTING.

1. The Litigants And Their Activities

The district court found, *on undisputed evidence* (A. 1-6a, 10a, 30a):

In 1956, Riverton, a bituminous coal producer [A. 2a (140)], became a wholly-owned subsidiary of Davison and continued as such until July 1, 1969 [A. 2a (100)]. Both had offices at Sunset Avenue, North Bend, Ohio [A. 2a (101-02)]. Riverton operated coal mines on leased properties in Kanawha and Fayette Counties, West Virginia, and operated coal loading docks on the Kanawha

River at Crown Hill and Marmet, West Virginia, and at all times material herein has been signatory to the National Bituminous Coal Wage Agreements (A. 6-7a).

Lewis A. Davison, Jr. was Riverton's President from 1959 or 1960 until 1969 (J.A. 183) and Davison's Vice President. Dan S. Davison was Davison's President and Riverton's Vice President. While the Davison family owns the majority interest in Davison [A. 2a (108)], the stock is owned by various shareholders (J.A. 108).

In the 1963-64 period, and preceding April, 1964, Riverton employed approximately 155 employees who worked under the 1950 Agreement, as amended effective October 1, 1958, in Riverton's West Virginia coal mines and docks and were represented by UMW (J.A. 105-06)[6]

Davison's *primary* business during 1955-68 was exclusive sales agent for Riverton's coal, receiving a commission of from 6% to 8% of coal sales prices, and keeping Riverton's books [A. 3a (101, 103, 138-39)]; it owned some coal land *but produced no coal, participated in no collective bargaining negotiations with UMW* and executed no UMW contracts [A. 3a (142, 317, 139, 318)].

As of January 1, 1964, Davison had no UMW employees in West Virginia [A. 4a (106)]. *Its ten employees at the North Bend, Ohio plant were represented by District 50, with whom it had a collective bargaining agreement* [A. 4a (106)].

Riverton owned no coal property but operated mining properties and produced coal at three mines in Kanawha and Fayette Counties, West Virginia, on land leased by Riverton from third parties. None of Riverton's leased

[6]UMW members produced from 75% to 82% of total production in the bituminous coal industry since the early 1940's [A. 4a (334)].

properties were owned by Davison [A. 3a (144, 103-04, 140, 142, 104)].[7]

At all times Riverton had sufficient coal reserves on property it leased to satisfy all orders and calls from customers—this was true quantity-wise and also grade or quality-wise. It did not increase its production to fill its orders and calls because Riverton "could not financially put in any more coal mines" [A. 4a (146, 203-04)]. Riverton's projected costs would have exceeded what it cost to acquire added coal through contracts with small operators, some union and some not, and some operating under subleases on land controlled by Riverton. *But for the financial limitations, Riverton's coal reserves were sufficient to produce all coal necessary to fill all of Riverton's and/or Davison's requirements to supply all its customers or contractees* [A. 4-5a (318-19, 919)].

Riverton did not mine all the coal it needed or that Davison needed to fulfill its contracts and it was customary "to buy supplemental coal" from various producers, some operating on Riverton's lands [A. 5a (107)]. Riverton had first refusal on coal produced by them [A. 5a (107)]. Riverton also bought coal from other producers operating on lands other than Riverton's [A. 5a (310)]. All coal so purchased, of varying qualities and grades, except for lump coal, was commingled [A. 5a (107-08)]. Most purchased coal was produced by companies not signatory to the UMW contract. *There is no evidence that "supplemental" coal purchased was purchased because Riverton-produced coal did not meet the type or quality demands of its customers. The only supplementing was in quantity.* Prior to January, 1964,

[7]While undisputed evidence shows that Davison owned *none* of Riverton's leased properties, the district court found "Some of Riverton's leased properties were owned by Davison" [A. 3a (33)].

Davison purchased coal from its wholly-owned Fields Creek Mining Co., which ceased production when its No. 3 mine worked out [A. 5a (307)].

The district court found that Riverton, during 1959-61, bought substantial amounts of coal from 32 operators (some union and some non-union) whose workers worked under less favorable conditions than did Riverton's employees who worked under UMW contracts [A. 30a (60)]; that Riverton "was doing substantial leasing (or subcontracting . .) and that the leasing bore some relationship with sub-union-standard wages and working conditions" (A. 31a); and that in 1962 and 1963, of over 2,170,000 tons of coal sold by Davison, 44 2/3%, or 967,354 tons, had been acquired by Davison and Riverton from third persons not owned or controlled by them or any affiliate; that during the nine calendar months before April, 1964, 78% of coal purchased by Riverton came from non-signatory mines and 22% came from signatory mines [A. 10a (40)].

Further, found the district court, "when the 80 cent constraint caused Riverton to cease buying from non-union operators, Riverton increased its own overall production so that the total tonnage handled by Riverton "in 1964 and 1965 compared favorably (a little less) with what was handled in 1963 and 1962" and, further, "This record does not explain why financial ability to expand production (1964-65) was missing in 1962-63" (A. 12-13a).

2. The History of Collective Bargaining in, and Relevant Economic Facts of, the Bituminous Coal Industry.

The district court found, *on undisputed evidence*, and premised upon National Bituminous Coal Wage Agreements, that collective bargaining in the bituminous coal

industry has long followed a multiemployer pattern and that UMW agreements have been on a uniform, industry-wide basis [A. 5-6a (946-53, 957-83, 1070-76, 359)]. This was true as to the 1964 and 1966 Agreements, with the exception of captive mines which use their own coal and do not purchase other coal [A. 6a (360-62)]. Similarly, the district court found, on undisputed evidence (A. 7-9a), that relevant economic facts of the bituminous coal industry showed the industry's capacity in 1958 was 625 million tons, the idle capacity was 215 million tons, while the percentage of capacity utilized was 65.7%; that 1963's capacity was 627 million tons, carried an idle capacity of 168 million tons, so that the percentage of capacity utilized was 73.2% [A. 8-9a (450-51)]; and that coal producers were able to "produce far more coal than the country could consume, up until the last six months", which was true for years prior to 1958 and 1964 [A. 8a (37-40, 450-51, 345)].

Similarly, the district court found, on undisputed evidence, that prior to the 1958 Agreement legitimate commercial practices gave rise to abuse, arising from the fact that coal produced in mines with substandard labor conditions could usually be purchased at prices below production costs in unionized mines. This resulted from lower wages paid in substandard mines and absence of contributions to any welfare fund, lax observance of safety requirements and generally lowered standards of working conditions and fringe benefits prevailing in these mines. *Before December 1, 1958, some producers, signatories to UMW's National Agreement, regularly purchased coal from substandard mines solely because of the cost differential, even though in many instances the purchasing producer had ample production capacity available to satisfy customers' requirements, and there*

were employees on lay-off status who were deprived of employment opportunities which would have been available had their employer elected to produce all the coal to be delivered to this customer rather than to purchase some from a substandard supplier [A. 9-10a (319-20)].

Wages paid in signatories' mines are materially greater than those paid by operators in non-signatory operations [A. 10a (986-92)].

3. UMW's Historical Efforts to Preserve Work Opportunities for Its Members Through Contractual Restrictions.

The district court found, on undisputed evidence, that historically and prior to the 1958 Agreement UMW sought to preserve work opportunities for its employee members by negotiating contractual restrictions upon the "contracting out" of work; the National War Labor Board directed that each UMW agreement provide that "Operators agree that they will not let any operating mines subject to this Agreement as a subterfuge" to avoid the agreement's provisions; an identical clause was contained in UMW's 1945 Agreement; the 1952 amendment to UMW's 1950 Agreement provided that "Operators signatory hereto agree that this Agreement covers the operation of all the coal lands owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement or acquired during its term which may hereafter . . be put into production," as well as the "subterfuge" provision; the 1952 Agreement's provisions were carried forward in the 1958 Agreement; and the 1964 and 1966 Agreements were expanded and provided (A. 11-12a):

> "As part of the consideration for this agreement, the Operators signatory hereto agree that this agreement covers the operation of all of the coal lands, coal producing and coal preparation

> facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this agreement, or acquired during its term which may hereafter (during the term of this agreement) be put into production or use"

and, further,

> "The Operators agree that they will not lease, license or contract out any coal lands, coal producing or coal preparation facilities for the purpose of avoiding the application of this agreement or any section, paragraph or clause thereof."[6]

The district court found, too, that on December 3, 1958, UMW and Bituminous Coal Operators Association (BCOA) executed the 1958 Agreement which was subsequently signed by Southern Coal Producers Association and other producers, including Riverton, under which some 80% of total production was produced in the bituminous coal industry [A. 13a (43)]. The 1958 Agreement contained the Protective Wage Clause (PWC) which provided [A. 13a (957-59, 960)] that:

> ". . the Operators agree that all bituminous coal mined, produced, or prepared by them, or any of them, or procured or acquired by them, or any of them under a subcontract arrangement, shall be or shall have been mined or produced under terms and conditions which are favorable to the employees as those provided for in this Contract."

A further provision of the clause provided [A. 13a (960)]:

> ". . any operator signatory hereto who is a party to any agreement inconsistent with the obligations assumed hereunder shall not maintain such inconsistent agreement in effect beyond the first date at which such agreement may be terminated by him in accordance with its terms."

[6] A. 11a (451, 940-42; 452, 943-44; 453, 944-46; 453-54, 946-47; 454-55, 947-53; 608, 612, 469-71, 1070-76).

On August 27, 1963, the National Labor Relations Board's Chairman and two members found the 1958 Agreement's PWC banned by the Act's Section 8(e) [*Raymond O. Lewis, et al.*, 144 NLRB 228 (August 27, 1963)]. On December 12, the Board, on reconsideration *en banc*, officially recorded its inability to arrive at a majority decision [A. 18-19a (48-49)].[9]

Then, because of NLRB's holding that PWC violated the law, yet ever mindful of the need to protect the work opportunities of UMW members by contractual provisions, UMW suggested to coal operators that UMW ought to have a contractual clause providing for $1.00 payments into the Welfare Fund; the operators rejected this suggestion and finally agreed on 80-cents a ton (A. 19a). *Contract signatories signed for "all of the production and acquired production"* (J.A. 331).

4. The District Court Found and Concluded that PWC, the 80-cent Clause and the Coal Lands Clause of the 1964 and 1966 Agreements Sought to Protect the Jobs and Work of Signatory Employees and to Maintain the Welfare Fund's Integrity, and Were Permissive Under the Act's Section 8(e).

Premised upon undisputed evidence,[10] the district court found the 1964 Agreement's 80-cent clause[11] was the

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[9]Subsequent proceedings before NLRB and the United States Court of Appeals for the District of Columbia are discussed, *post*, pp. 31-34.

[10]J.A. 324-36, 343-46.

[11]The 80-cent clause in the 1964 and 1966 Agreements provides that (J.A. 606-07):

"During the life of this agreement there shall be paid into such Fund by each Operator signatory hereto the sum of forty cents (40¢) per ton of two thousand (2,000) pounds on each ton of bituminous coal produced by such Operator for use or for sale. On all bituminous coal procured or acquired by any signatory Operator for use or for sale, (i.e., all bituminous coal other than that produced by such signatory Operator) there shall, during the life of this Agreement, be paid into such Fund by each Operator signatory hereto or by any subsidiary or affiliate of such Operator signatory hereto the sum of eighty cents (80¢) per ton of two thousand (2,000) pounds on each ton of such bituminous coal so procured or acquired on which the aforesaid sum of forty cents (40¢) per ton had not been paid into said Fund prior to such procurement or acquisition."

"direct and inseparable result of an effort by the Union to devise a 'legal' substitute and 'collectively bargain' it through", and "The result was the inclusion of the 80-cent clause and 'application to coal lands' clause in the contract" [A. 16a (46)]; that the challenged clauses "were bargained for by UMW in a sincere effort to stop the employers' practice—which was prevalent—of avoiding the burdens (to the employer) of a union contract by the legalistic subterfuge of 'leasing' or 'dummying' " [A. 12a (42)] because the contractual provisions up to 1964 "did not do much good" [A. 12a (42)]; that prior to and when PWC was negotiated in 1958, and "to and at the times the 80-cent clause was negotiated (at the multi-employer levels) in 1964 and 1966 *'subcontracting' . . was a real and not fancied problem"*; that *"The primary target of the union—intent—in bargaining out PWC was unquestionably subcontracting"*; that *"The clause was directed at (1) job security, (2) welfare fund integrity; that whatever the unit, that was the real primary intent"*; and *"the primary purposes of the somewhat enforced substitute (80¢ clause) were the same as the original (PWC), i.e., to protect the jobs and work of signatory employees and maintain the integrity of the Welfare Fund"* [A. 19-20a (49)]; and that UMW's purpose and intent in negotiating the clause "was primary and not secondary" [A. 12a (42)].

The district court held "neither PWC nor the 80-cent clause ran afoul of 8(e)"; that their purpose *clearly* was "to tackle in a successful way a legitimate problem of subcontracting and work preservation which had existed for decades and had been attacked for decades in unsuccessful contractual methods"; that a secondary effect of each clause "was the protection of the Welfare Fund—clearly a legitimate primary (in a labor sense) target";

that though a "secondary effect" was unionization of some non-union employers, it was "foreseeable and in that sense was a purpose at the time the clauses were negotiated"; and that the secondary purpose was an incident to the primary purpose, which was work preservation, and "obvious on the record that the unionization effect was a matter of choice, even to neutral employers", not a matter of compulsion [A. 55a (83-84)]. Specifically, with reference to Riverton, the district court concluded, *"On this record, one could only conclude that the 80-cent clause did exactly what it was designed to do—it resulted in the employer producing more with his own employees than he ever had before by substantial percentages"* [A. 55a (84)], noting "This record does not explain why financial ability to expand production (1964-65) was missing in 1962-63" [A. 13a (42-43)]. It agreed, too, there was nothing secondary about the coal lands clause [A. 44a (73)].

5. The District Court's Conclusions Concerning the Validity of the Challenged Clauses.

Regarding the crucial inquiry to be "whether the 80-cent and coal lands clauses of the 1964-66 contracts violate" the Act's Section 8(e), the district court held "neither PWC nor the 80-cent clause ran afoul of 8(e)"; that the purpose *clearly* was "to tackle in a successful way a legitimate problem of subcontracting and work preservation which has existed for decades and had been attacked for decades in unsuccessful contractual methods"; that a secondary effect of each clause "was the protection of the Welfare Fund—clearly a legitimate primary (in a labor sense) target"; that though a "secondary effect" was unionization of some non-union employers, it was "foreseeable and in that sense was a purpose at the time the clauses were negotiated"; that

the secondary purpose was an incident to the primary purpose, which was work preservation, and "obvious on the record that the unionization effect was a matter of choice, even to neutral employers", not a matter of compulsion; and that the 80-cent clause "resulted in the employer producing more with his own employees than he ever had before by substantial percentages"; and there was nothing secondary about the coal lands clause [A. 42a, 55a, 44a (72, 83, 84, 73)].

C. FACTS AND THE DISTRICT COURT'S FINDINGS AND CONCLUSIONS CONCERNING THE 1964 AND 1966 WORK STOPPAGES.

1. The 1964 Work Stoppage.

The 1958 Agreement was subject to termination after November, 1959 by a 60-day written notice [A. 14a, 20a (957-67)]. Though UMW gave no termination notice to Riverton, undisputed evidence is that if a signatory operator refused to sign the new 1964 Agreement, a 60-day notice was given [A. 20a (50, 363)]. As the district court found, Bituminous Coal Operators Association and Southern Coal Producers Association waived the notice [A. 20a (50, 341-42)], but Riverton did not.[12]

The district court found that in the fall of 1963 UMW, through District 17, called Riverton's attention it was doing business with non-union operators, operating under leases from Riverton on lands controlled by it and the purpose was to secure Riverton's "help" in organizing these operators in exchange for a UMW "consent" to a business enterprise Riverton was interested in [A. 20-21a (50)].

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[12]Though the district court declared Riverton's union employees "in fact and law" had a binding contract extending to April 15, 1964, the district court declared the instant action was not one for breach of contract under the Act's Section 301 [A. 20a, 57-58a (50, 86)].

Uncontradicted evidence is that the strike was not called or ratified by UMW or District 17 or by any officer or representative thereof (J.A. 439).

As the district court found [A. 4a (616-40)], Riverton employees were members of UMW Local 1209, chartered by UMW under Article VI of its Constitution.

Despite a denial by District 17's field representative Emery McCoy, Riverton's president testified that about April 2, 1964 the representative warned him "there probably will be trouble" when Riverton employees learned Riverton had not signed the new agreement [A. 21a (50)].

Prior to the strike, Riverton employees had contacted District 17's field representative on April 3 and April 9, 1964 to inquire if Riverton had signed the 1964 amendment which BCOA signed on April 2 and was also signed on KCOA's behalf.

McCoy advised the men Riverton, which had not authorized BCOA to execute the agreement for it, had not signed. *On both occasions, McCoy was apprised by Riverton employees they intended to strike, and especially so on April 9, when the men were aware numerous other operators in the area had signed the agreement. On both occasions, McCoy insisted the men keep working,* saying he was confident Riverton would sign. The strike occurred on April 10, notwithstanding McCoy's instructions (J.A. 367-76).

It is *undisputed* that on April 11 (a Saturday) McCoy was notified by District 17 President Humphreys the Riverton mine was down and was instructed by Humphreys to do what he could to get the mine in operation. McCoy attempted unsuccessfully to arrange a meeting

of the men, and insisted to those he could locate they return to work. They told him, as they had told Riverton's President on the evening the strike started, they would return only upon being advised Riverton had signed the agreement (J.A. 367-76).

On April 13, Riverton officials met with District 17 President Humphreys, who stated in his opinion the Riverton mine would return to work if the agreement was signed (J.A. 187, 350). Riverton thereupon wired UMW's President advising UMW of its willingness to sign the 1964 Agreement if UMW would eliminate the sections thereof amending provisions dealing with contributions to the UMW Welfare and Retirement Fund (the "80-cent" clause) and the "Application of Contract to Coal Lands" clause, both of which Riverton asserted to be illegal (J.A. 807-09). UMW's then Vice President, R. O. Lewis, denied the union's involvement in the strike, which he termed "a voluntary protest" of employees against Riverton's failure to execute the then current agreement. Lewis also denied the provisions in question were illegal and expressed the hope Riverton would sign the agreement which had then been signed by the majority of coal companies in the country (J.A. 810). On April 15, Riverton advised UMW it would sign the agreement and asked that Representative McCoy be sent to its office for that purpose. McCoy went to Riverton's office, where he was presented with the agreement form, as executed by Riverton. Riverton advised McCoy the agreement was signed under protest. The mine thereupon returned to work (J.A. 188, 376-77).

Arby McCoy (not related to Emery McCoy), Local Union 1209's Financial Secretary and Mine Committee Chairman elected by members working at the mines (J.A. 423-24), *whose testimony is unrefuted,* testified he

learned of Riverton's failure to sign the 1964 Contract from District 17 when he was told that Riverton hadn't signed the contract yet "but they are going to" and the District advised that the men continue to work, which he reported at a local union meeting on April 4, 1964, and was instructed there to ascertain whether Riverton intended to sign the contract (J.A. 425-26). Arby McCoy's further unrefuted testimony is that he was pressed by the working miners for an answer to the inquiry, "when are we going to strike? Let's strike, we are going to come out, we don't have a contract yet" (J.A. 426); on Friday, April 10, Arby McCoy and the local's President Perry visited Lewis Davison, Riverton's President (denied by Davison, J.A. 475-76), where they were told that Riverton was not going to sign the new agreement because of the "land clause in there, which is the 80 cents" (J.A. 426), to which Arby McCoy replied he had never worked without a contract and did not intend to work without one (J.A. 426).

Henry Oakes, Chairman of the Mine Committee of Transport, Inc., which hauled coal for Riverton and was under contract with UMW at the time, corroborates Arby McCoy's testimony that upon being advised of Davison's intention not to sign the contract, he declared he would not "scab either" and that the trucks quit hauling coal about nine o'clock on Friday, April 10 (J.A. 426-27, 437-38). As Oakes related, "no contract, no work", that "we had already worked a few days there, the men was pretty hot", and "if you have ever been around coal miners . . when they get hot, sometimes they get furious" (J.A. 438).

Despite corroborative evidence, the district court found the April, 1964 strike was to force or require Riverton to

enter into the proposed agreement, and force or require it and Davison to cease dealing in production of coal producers not signatory to UMW's agreement and to cease doing business with them. But, the district court declared that "Another effect of the said strike was to encourage coal producers selling coal to Riverton or Davison to recognize or bargain with the defendant Union as the representative of the employees of such producers", even though UMW had not been certified as such [A. 25a (55)].

Following Riverton's execution of the 1964 Agreement on April 15, 1964, Riverton bought no more coal from non-signatory suppliers (A. 26a) and its president informed all suppliers that it had so signed and that because thereof "they would have to become signatory to the contract and furnish me with a letter saying they were a signator before I could buy any more coal from them" (J.A. 194).

The district court found (A. 25a) after Riverton signed the 1964 Agreement, and as a result thereof, some 15 non-union producers from which Riverton bought supplemental coal became signatories to UMW's contract but 22 did not: hence, the district court found "*the effect was not to 'force' or 'compel' but to encourage*" and "Such 'encouragement' was not a primary object of the strike--it was a recognized incident" and "*The design or purpose or object remained—job protection*" [A. 25a (55)].

In holding UMW responsible for the 1964 stoppage, the district court rejected unrefuted testimony and found UMW and its District 17 agents had knowledge on and before April 10 that UMW members employed by Riverton believed their collective bargaining agreement was about to terminate and that members might not work

without a contract "i.e., the officials knew that the men working in the mines, on learning of the end of the BCOA-UMW negotiations in March, 1964, and the contract formalization in early April, concluded that ended all existing contracts and made 'scabs' of them if they worked for any operator who had not ... signed the newly negotiated contract"; that "These agents also knew that the Riverton contract had not been terminated, that no termination notice had been given by either party, and that the contract would remain in full force and effect for at least sixty days after such a notice was given" and that "With full knowledge of the men's belief they took no steps to advise the members that the contract had not been terminated and would continue to remain in full force and effect" [A. 23a (53)].

The district court further found field representative McCoy was authorized by UMW and its District 17 to handle the Riverton matter and "the Union's 'man' in charge on the spot, threatened 'trouble' if Riverton did not sign the new printed form of agreement"; that "When Riverton employees in effect asked" the representative "if Riverton and UMW still had a contract he 'told them that they didn't have one' "; and that for many years, as the representative knew, UMW "has had a tradition 'no contract, no work' " [A. 23-24a (53)].

As an ultimate finding of fact, the district court declared "the action of the District representatives, in its context, was equivalent of a 'signal' to 'strike' and was so intended" by them and the men and that the "Union instructed its members to strike, not by direct viva voce but in 'union lingo'—as well understood by all concerned ..." [A. 24a (54)].

While avowing, under *UMW* v. *Gibbs*, 383 U.S. 739,

and "that part of *Coronado*, 259 U.S. 344 (1921)" and "268 U.S. 295 (1925), which survived subsequent statutory enactments" the district court could not hold UMW responsible under any theory of passivity (failure of defendant's agents to end the strike), or to take disciplinary measures against "Union local officer or member for participation in an 'unauthorized' strike", nonetheless the district court, finding "Something affirmative is required before a conclusion of 'union authorization' is justified", found such requirement in the 1958 Agreement's "integrity" provision[7] and not "the quasi-affirmative expression of District 17 on April 10, 1964, that there was no contract between Riverton and the Riverton workers" declaring, "There was" [A. 24-25a (54-55)].

2. The 1966 Work Stoppage.

The 1964 Agreement continued effective until March 31, 1966, and was terminable thereafter by a 60-day notice. UMW gave Riverton no termination notice. A strike beginning on April 12, 1966 again shut Riverton down. It ended about April 27, 1966, when Riverton agreed to sign the 1966 Agreement, which it executed on May 3 of that year, after informing UMW the 50-cent clause was unlawful and Riverton was signing "under protest" [A. 26a (605-09)].

The stoppage's immediate cause was a picket line at Riverton and elsewhere by dissident members of UMW Local Union 8843 [A. 27a (407, 414-16)]. The indirect cause of the unrest which affected *not only Riverton but other area mines as well*, was dissatisfaction with a con-

[7] This provision provided that UMW and the signatory operators "agree and affirm that they will maintain the integrity of this contract" and that all disputes and claims, not settled by agreement, shall be settled by the Agreement's "Settlement of Local and District Disputes" section, unless national in character, in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry.

tract which they had understood had been negotiated in the industry on or about April 1, 1966, and which it was believed was to become the basis for other UMW contracts [A. 27a (439, 441)]. At the time of the stoppage, UMW was in negotiations with BCOA for a new agreement. *In fact, neither the stoppage nor wage negotiations then underway or which thereafter occurred in 1966 was concerned with the 80-cent clause or the Land Lease clause; they were concerned with other economic factors* [A. 27-28a (441, 993-95)].

UMW did not, nor did District 17 or any of its agents, authorize or ratify the work stoppages at Riverton or elsewhere, nor did either party authorize or ratify the picket lines of Local Union 8843. As of April 11, 1966, several area mines were involved in the stoppage. UMW's International Officers directed District 17, by telegram, to instruct the men to return to work pending outcome of negotiations (A. 28a). District 17 had its representative, Emery McCoy, thus advise the groups of men involved. McCoy read the International Officers' telegram to the men and repeatedly called upon them to return to work (J.A. 383). He also called upon the officers of Local Union 8843 (J.A. 413). The men refused to return in spite of his efforts (J.A. 334, 410-11). While this situation prevailed, UMW succeeded in reaching an agreement with BCOA. Most area mines, including Riverton, made known their intention to sign the agreement and thereupon the Riverton men resumed work. As in 1964, Riverton signed the wage agreement individually, *and although the so-called "80-cent" provision had not been an item of dispute in 1966 negotiations, Riverton again noted in a letter to District 17 that execution of the amendment on its part was under protest because of the provision* (J.A. 811).

The 1966 Agreement carried forward and preserved the terms and conditions of the 1950 and 1952 Agreements as amended or supplemented thereby including, as the district court found, "the 40-80 cent welfare clauses" and the "Application of Contract to Coal Lands" clause. As the district court found further "At the multi-employer-Union level the 1966 negotiations were not concerned with the 80-cent clause", which caused the sporadic and wildcat strikes in general in April of 1966 (A. 26-27a).

As the Bureau of Labor Statistics, United States Department of Labor, reports in its Bulletin No. 1558 dealing with wage chronology in the bituminous coal mines, 1933-68 recites [A. 28-29a (993-95)]:

> *"On April 11, 1966, in the absence of agreement on the union's proposals, about half of the industry's mines were closed by a walkout, and remained closed until an agreement reached on April 24 was ratified by the workers and signed by the parties on April 27. The parties to the earlier settlement at mines in the midwest rescinded that agreement on April 27 and on the same date signed an agreement identical to that negotiated by the Bituminous Coal Operators' Association."*

Riverton did not, after execution of the 1966 amendment, purchase coal produced by operators who had not signed the current UMW agreement (A. 29a).

3. The District Court's Conclusions Concerning the 1964 and 1966 Work Stoppages.

The district court concluded *none* of the "proximate results and foreseeable effects . . nor the collection of them, constituted the primary purpose for exacting the 80-cent clause bargain" which was to "prevent subcontracting, preserve Riverton's employees' work, maintain

union standards in the production of coal which could just as well have been produced by Riverton and protect the integrity of the Welfare Fund" [A. 56a (85)], although it also concluded UMW "induced and encouraged individuals employed by" Riverton "to engage in a strike and a refusal to perform services for Riverton in the course of their employment and also threatened, coerced and restrained Riverton, as those words are used in 8(b)(4)(A) and (B)" [A. 55-56a (84)]; that "An object, and by far the primary object, of such conduct was to force and require Riverton to enter into the 1964 Agreement containing the 80-cent clause" [A. 56a (84)], which proximately resulted in forcing Riverton to cease dealing in products of other coal producers, not unionized, and of forcing "some then non-union producers to unionize", thus bargaining as the representative of employees UMW did not represent as a matter of certification [A. 56a (84-85)].

In concluding the 1964 strike was union-authorized, the district court "applied *Coronado* as modified by 29 U.S.C. §185(e)"; and in applying that section, the district court, declaring it had "not held the plaintiff to proof of specific authority", nonetheless declared "*the authorization of the Field Rep. McCoy to represent the District on the spot included an authorization to call a strike, which he did as effectively as if he had used that language when he gave the signal, 'I told them that they did not have one'—meaning a contract*" [A. 56-57a (85)], *and that plaintiffs had shown by a preponderance of evidence that UMW, "through its District 17, authorized the 1964 strike"* [A. 57a (85)].

With respect to the 1966 strike, the district court concluded "*there is no evidence . . based on which this Court*

could say" plaintiffs maintained the burden of proving by a preponderance that "District 17, or the defendant, either authorized or ratified the 1966 strike at Riverton" and that "There is certainly no connection whatever between the 80-cent clause in either the 1964 or 1966 contract and the 1966 strike" [A. 57a (86)].

D. THE SIXTH CIRCUIT'S OPINION AND JUDGMENTS.

1. As to the Challenged Clauses.

In total disregard of the district court's findings and conclusions concerning the challenged clauses and the limitation imposed upon the Sixth Circuit by Rule 52(a), Federal Rules of Civil Procedure,[14] the Sixth Circuit held "The eighty cent penalty clause was not directed at job security, because Riverton could comply therewith by closing its mines, discharging all of its employees, and filling its entire requirements with coal from other signatory mines" and "Furthermore, Riverton could purchase coal from a signatory mine supplier whose employees were operating under substandard wages and working conditions" and, further, "The trouble is that the clauses in question here were not 'addressed to the labor relations of the contracting employer [Riverton] vis-a-vis his own employees', but on the contrary, to the boycotted employers (nonsignatory suppliers)" (A. 71a).

Rejecting the district court's and UMW's reliance on NLRB's *Int. Union, UMW, et al.*, 188 NLRB No. 121, 76 LRRM 1394, 1396 (1971), the Sixth Circuit pointed out "the Board has not been consistent in its rulings on

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[14] Rule 52(a), F.R.C.P. provides, in part:

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58 . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

either the eighty-cent or the PWC clause"; that NLRB "first held that PWC was illegal" and "The following year . . it held the eighty-cent clause illegal"; and, though noting the remand of the District of Columbia Circuit as to PWC and the 80-cent clause, as well as NLRB's subsequent imprimatur of both PWC and the 80-cent clause, the Sixth Circuit held "In our view, the Board decisions holding the two clauses to be illegal, appear to be better reasoned decisions", observing that "Seven Board members have held the eighty-cent clause invalid" and that "Only three Board members and no trial examiner have held otherwise" (A. 73a).

Further, the Sixth Circuit opined, "We do not regard the decisions of the Board as controlling on us in damage actions under Section 303" (A. 74a).

In Riverton, declared the Sixth Circuit, "the supplemental coal which Riverton and Davidson were purchasing from signatory and nonsignatory suppliers involved work which was never performed by their own employees" and that "Riverton was operating at all times at full capacity, but because of lack of working capital and of mining equipment, it could not run additional mines, and it was necessary for Riverton to purchase coal to fill its orders" (A. 71a).

2. As to the Work Stoppages.

a. The 1964 stoppage and its purpose.

The Sixth Circuit emphasized that "If any object of the strike is forbidden by Section 8(b)(4), it is a secondary boycott" and "It is not necessary to find that it was the sole object"; and, pointing to the district court's finding that "an object" of the 1964 strike was to force Riverton to sign the agreement containing the 80-cent

clause while another object was to compel Riverton and Davison to cease doing business with, and to cease using the products of other coal producers who were non-signatories (A. 70a), the Sixth Circuit declared "The forseeable purpose of the eighty cent clause was 'the unionization of some non-union employers'" (A. 70a). Significantly, however, in quoting the district court's findings of "another object", detailed herein (*ante*, pp. 19-22), the Sixth Circuit failed to include the district court's further finding that "Some twenty-two did not—so the effect was not to 'force' or 'compel' but to encourage" and "Such 'encouragement' was not a primary object of the strike—it was a recognized incident" and, further, "*The design or purpose or object remained —job protection*" (A. 25a).

Disagreeing with UMW that the district court's finding that UMW authorized or ratified the 1964 strike is not supported by substantial evidence and is clearly erroneous, the Sixth Circuit declared (A. 72-73a):

> "The District Court detailed the evidence to support its findings, which included the conduct of Field Representative Emery McCoy and other UMW agents who, although they knew that the 1958 contract was still in full force and effect, led Riverton employees to believe that they did not have a contract. As these agents well knew, UMW members had a tradition of 'no contract, no work'. To tell them that they had no contract was the 'signal' for them to strike. The strike was settled only when Riverton signed under protest the new agreement containing the eighty cent penalty clause. Thus UMW also ratified the strike. The testimony to the contrary of UMW agents was not credited by the District Court. The testimony of the McCoy's was characterized by the Court as 'less than candid.'"

The Sixth Circuit also held the 1964 strike violated the 1958 Contract which the district court held contained a 'no strike' clause (A. 72a); *but the Sixth Circuit ignored the district court's further finding that "Since . . this Court attaches no significance to any union inaction"; and "this is not a 301 case this finding No. 45 had no effect on the decision of this Court"* (A. 30a).

b. The 1966 stoppage

Rejecting UMW's argument that subcontracting is a bargainable issue, as held in *Fibreboard Paper Prods. Corp.* v. *NLRB*, 379 U.S. 203 (1964), the Sixth Circuit held "This case is inapposite for it involved the contracting out of maintenance work previously performed by the company's employees and such contracting out would have adversely affected them by reason of discharges and layoffs" (A. 71a), whereas the Sixth Circuit further held the 1966 strike also illegal, "violated the provisions of the 1964 'no strike' contract" and the Act's Section 8(d) [A. 74a].

Noting Riverton could terminate the 1966 strike only by signing the 1966 amendment, which it did under protest and which, as the Sixth Circuit stated, "contained the illegal eighty-cent penalty clause", the Sixth Circuit declared UMW did nothing to persuade its members to return to work other than to send a telegram and "did not even tell them that they had a valid contract which was being violated by their work stoppage" (A. 74a). Further, declared the Sixth Circuit, UMW "did not undertake to discipline the strikers", characterizing its inaction as "a form of influence and persuasion" (A. 74a). To the Sixth Circuit, "UMW benefited by the strike and took advantage of that fact to get a new contract" (A. 74a).

The Sixth Circuit likewise attributed responsibility for the 1966 stoppage to UMW because, as it declared, "Local 1209 was not an autonomous labor organization separate and apart for UMW" but "was an administrative arm" of and "was supervised, dominated and controlled by UMW" because "UMW had the right 'to reverse the action of the Local Union' " and with power to correct the local union's unlawful action and deciding to accept the benefit of it instead of taking appropriate action to halt the strike as it was required to do under the Contract, UMW thereby induced and encouraged both the 1964 and 1966 strikes (A. 75a).

According to the Sixth Circuit, "The findings of fact by the District Court that UMW did not induce or encourage the 1966 strike, and did not thereby violate the Act, are not supported by evidence and are clearly erroneous" (A. 75a).

3. As to Damages and Judgments.

Having held the challenged clauses to be illegal, the Sixth Circuit noted the district court had rejected damages claimed by plaintiffs "except to the extent" of $150,312.50, plus interest (A. 76a).[15] As indicated (*ante*, p. 6), the Sixth Circuit directed entry of judgment therefor. The Sixth Circuit rejected UMW's claim of excessiveness to be "clearly without merit" (A. 78a).

4. As to Davison.

Agreeing with the district court (A. 42a), the Sixth

[15]This amount included (A. 59-60a):

1. Lost profits of $64,000.00.
2. Amount paid Ford Coal Company in compromise of a suit brought by it for a breach of contract of $15,000.00, and incurred attorneys' fees and expenses of $1,793.46 in defense of the case.
3. Damages from the 1964 strike of $13,095.57.
4. $36,128.50 from the 1966 strike.
5. Attorneys' fees and expenses of $20,294.97 in prosecution of unfair labor practice proceedings against UMW with respect to the same factual matters now before the Court.

Circuit was of opinion that "Riverton and its parent corporation Davison are proper parties to bring the action" (A. 78a).

E. PURSUANT TO THE DISTRICT OF COLUMBIA CIRCUIT'S INDICIA, NLRB HAS SUSTAINED THE VALIDITY OF PWC AND THE 80-CENT CLAUSE AS PERMISSIVE UNDER SECTION 8(e).

1. NLRB Has Validated PWC.

The district court found (A. 18-19a):

As noted (*ante*, p. 13), on August 27, 1963, three NLRB members of NLRB found the 1958 Agreement's PWC banned by the Act's Section 8(e) [144 NLRB 228]; and on December 12, 1963, NLRB, on reconsideration *en banc*, officially recorded its inability to arrive at a majority decision. Thereafter, in *Raymond O. Lewis, et al.*, 148 NLRB 249, PWC was again held by a Board panel to fall within Section 8(e)'s ban, even though NLRB had characterized PWC as a "union standards clause". Upon appeal, the District of Columbia Circuit, noting its prior holdings that *such a clause* would not ordinarily violate Section 8(e) so long as it was germane to the economic integrity of the principal work unit or sought to protect and preserve the work and standards the union had bargained for, remanded the case to NLRB to consider the effect of the union standards clause, to determine the unit size to which it applied and to bear in mind the problems of "substitute" and "supplemental" coal in subcontracting in the bituminous coal industry. *Lewis, et al.* v. *NLRB*, D.C. Cir., 350 F.2d 801. Upon remand and approving an NLRB trial examiner's findings or conclusions that the work unit was the bargaining unit, that PWC's invalidity was not established merely by showing it might have a secondary impact on occasion, that PWC did not compel the industry's unorganized segment to

sign the contract and that PWC's intention was to encourage but not compel unorganized operators to sign. *NLRB found PWC "was adopted by the contracting parties . . to protect and preserve the 'unit work' of employees covered by the contract by precluding the subcontracting of 'unit work' to operators who did not maintain union standards"* and, accepting the District of Columbia Circuit's view "of the legality of protecting unit work through the medium of a union standards clause", *held PWC "does not contravene Section 8(e)". W. A. Boyle, et al.*, 179 NLRB No. 80, 72 LRRM 1426, 1428-29 (1969).

2. NLRB Has Validated the 80-cent Clause.

Included in the district court's conclusions is a history of the 80-cent clause before the District of Columbia Circuit and the NLRB:

> The validity of the 80-cent clause was first posed to NLRB following its inclusion in the 1964 Agreement. NLRB, with Board member Jenkins dissenting, found that "Given the operative economic and industrial factors in the industry, the inclusion of the instant clause in the 1964 Agreement constitutes secondary pressure on unsigned Operators" and that "The instant clause . . is . . an implied union signatory agreement restricting the subcontracting of work to operators under contract with the UMW, without regard to unit considerations" [*Raymond O. Lewis, et al.*, 148 NLRB 249, 255 (1964)].[14]

Meanwhile, in June, 1967, NLRB (with Board member Jenkins dissenting) held the 80-cent clause "does not qualify as a wage-standards provision because a penalty is imposed whenever unit work is subcontracted to nonsignatory operators without regard to the wage standards

[14] Both PWC and the 80-cent clause were before the District of Columbia Circuit in *Lewis* v. *NLRB*, 350 F.2d 801, in which, as already noted (*ante*, p. 31), that Court remanded the case to NLRB.

of such employers" [*Int. Union, UMWA, et al.*, 165 NLRB 467, 468 (1967)]. But, *upon review*, the District of Columbia Circuit declared that "*Since the 80-cent clause is by everyone's admission and our characterization a substitute for the union standards clause*"[11] and remanded the case to NLRB, "to carefully consider whether in fact" the clause functioned as one and that "If it is a union standards clause and the Board affirms *Boyle*,[12] the 80-cent union standards clause would seem to be a valid provision" [*Int. Union, UMWA* v. *NLRB, et al.*, D.C. Cir., 399 F.2d 977, 980 (1968)].

With PWC's validity established in *Boyle* (*ante*, p. 32), NLRB undertook to determine the 80-cent clause's legality status.

Upon remand, a Board majority (with Chairman Miller and Member Brown dissenting), in agreement with its examiner, found the evidence established that (1) *the parties' intent* in adopting the 80-cent clause "*was to equalize the differences in the costs of wage and fringe benefits generally existing between mines signatory*" to the National Agreement and "those which are not *in order to protect the work opportunities and standards provided UMW members employed by signatory operators*", (2) wage, fringe and working condition standards of employees in nonsignatory mines are generally lower than those established in the National Agreement; and (3) the 80-cent payment to which signatories are obligated on nonsignatory coal purchases bears a reasonable relationship to the wage and fringe benefit

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[11] Since plaintiff's Dan S. Davison was an intervenor in *Int. Union, UMWA* v. *NLRB, et al.*, D.C. Cir., 399 F.2d 977, 980 (1968), it is obvious the District of Columbia Circuit's reference to "everyone's admission" included plaintiff's intervenor Davison.

[12] After the District of Columbia Circuit's remand of PWC to NLRB, the style of the case was changed from "Lewis" to "Boyle".

differentials between employees of signatory and nonsignatory operators. *Int. Union, UMWA, et al.*, 188 NLRB No. 121, 76 LRRM 1394, 1395 (February 26, 1971).

NLRB concluded "*the 30-cent clause functions as a union standards clause in protecting and preserving the work of employees working under the UMW agreement* and the standards under which such work is performed by removing the economic incentive to subcontract such work stemming from the lower wage and fringe benefit cost of nonsignatory mines" (p. 1395). NLRB's General Counsel held the coal lands clause *not to be secondary* (A. 44a).

As NLRB's *Int. Union, UMWA, et al.* recites, "As the allegations of Sec. 8(b)(4)(i), (ii)(A) and (B) violations are dependent on our finding that the 30-cent clause violates Sec. 8(e), we shall also dismiss those allegations of the complaint" (76 LRRM 1396, fn. 12).

REASONS FOR GRANTING THE WRIT

A. THE SIXTH CIRCUIT'S HOLDINGS CONCERNING THE CHALLENGED CLAUSES CONFLICT WITH PRIOR IMPORTANT DECISIONS AND PRINCIPLES OF THIS COURT, THE DISTRICT OF COLUMBIA CIRCUIT AND NLRB.

Under the Act's Section 303(a) [A. 85a], it is unlawful for a labor organization "to engage in any activity or conduct defined as an unfair labor practice in" Section 8(b)(4).

The Act's Section 8(b)(4)(A) [A. 81-82a] makes it an unfair labor practice for the union to engage in, or induce or encourage employees to engage in, a strike or refusal in the course of the employees' employment to perform services, or threaten, coerce or restrain an employer where an object is to force or require any employer to enter into an agreement prohibited by Section 8(e). Section 8(b)(4)(B) [A. 82a] makes it an unfair

labor practice for a union either to strike to force any person to cease doing business with any other person or forcing any other employer to recognize or to bargain with the union as representative of its employees unless the union has been certified as such, but the proviso therein states, "*That nothing contained in this clause (B) shall be construed to make lawful, where not otherwise unlawful, any primary strike or primary picketing.*"

Under the Act's Section 8(e) [A. 84-85a], Congress forbids, as an unfair labor practice, agreements between a labor organization and an employer by which the latter agrees to cease or refrain from dealing in the products of another employer, or to cease doing business with such employer. The Sixth Circuit rejected UMW's argument the 80-cent Welfare Fund and the coal lands clauses are primary and lawful because their purposes or aims are to protect the negotiated labor standards of those employees whose employers are signatories to UMW's National Agreement, and to preserve their employment opportunities (A. 70a).

A Sixth Circuit basic error is its ignoring that for a labor organization to violate Section 8(b)(4) *the prohibited conduct thereunder must be for a banned object* which, under 8(b)(4)(A) requires the bargaining agreement to be prohibited under the Act's 8(e), and that under 8(b)(4)(B) a *primary* strike does not constitute an unfair labor practice.

The Sixth Circuit's holdings that the challenged clauses were not "addressed to the labor relations of the contracting employer [Riverton] vis-a-vis his own employees' but, to the contrary, "to the boycotted employers (nonsignatory suppliers)", and that the 80-cent clause "was not directed at job security" (A. 71a), conflict with

this Court's avowed disinclination to condemn labor agreements as illegal per se and to "assume that a union conducts its operations in violation of law". *Local 357, Teamsters* v. *NLRB*, 365 U.S. 667, 676; *NLRB* v. *News Syndicate Co.*, 365 U.S. 695. These enunciations are consistent with *Great Northern Ry. Co.* v. *Delmar Co.*, 283 U.S. 686, 691, which declares "where two reasonable constructions of a written contract can be made, preference is given to that construction . . that does not result in a violation of law."

Additionally, *National Woodwork Mfgrs. Assn.* v. *NLRB*, 386 U.S. 612 (1967) admonishes lower federal courts that the determination whether a union-management agreement falls within the scope of Sections 8(e) and 8(b)(4) "cannot be made without an inquiry into whether, under all the surrounding circumstances, the Union's objective was preservation of work . ., or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere" (p. 644).

Following the above mandate of this Court, the district court's findings and conclusions that the challenged clauses were permissive under Section 8(e) were predicated upon undisputed facts relating to the bituminous coal industry's history of collective bargaining and its relevant economic facts (*ante*, pp. 9-11), UMW's historical efforts to preserve work opportunities for its members through contractual restrictions (*ante*, pp. 11-13), UMW's achievement of the challenged clauses (*ante*, pp. 13-15) and its being concerned with the same economic reasons and the need for protecting work opportunities and security of employees as confronted it in demanding PWC in the 1958 Agreement. Furthermore, it had this Court's word that subcontracting was a bargainable issue

[*Fiberboard Paper Prods. Corp.* v. *NLRB*, 379 U.S. 203 (1964)] and that multiemployer collective bargaining was permissive (*NLRB* v. *Truck Drivers Local No. 449, Teamsters*, 353 U.S. 87).

The Sixth Circuit's failure to inquire "whether, under all the surrounding circumstances, the Union's objective was preservation of work" (386 U.S. 644), in disobedience to this Court's mandate in *National Woodwork*, readily explicates the Sixth Circuit's error in rejecting the district court's approval of the challenged clauses and for regarding as inapplicable *National Woodwork's* classic guidelines, namely, that "*The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees*" (p. 645) *and that Section 8(e) was designed to condemn subcontracting clauses possessing secondary pressure characteristics* (pp. 645-46).

Further, the Sixth Circuit's efforts to condemn the challenged clauses on the basis that "supplemental coal which Riverton and Davison were purchasing from signatory and nonsignatory suppliers involved work which was never performed by their own employees" are answered, *first*, by the undisputed evidence that Riverton covenanted in the 1964 and 1966 Agreements that "the operation of all the coal lands, coal producing and coal preparation facilities owned or held under lease by them" and that Riverton would not "lease, license or contract out any" thereof "for the purpose of avoiding the application of this agreement or any section, paragraph or clause thereof" (A. 11-12a) and, *secondly*, undisputed evidence was that contract signatories signed for "all of the production and acquired production" (J.A. 331). Furthermore, as the District of Columbia Circuit's *Teamsters, Local 710* v. *NLRB*, 335

F.2d 709, 713-14 (1964) held "Activity and agreement which directly protect fairly claimable jobs *are primary under the Act.*"

Since the district court found that "wages paid in signatory mines are materially greater than those paid by operators in non-signatory operations" (*ante*, p. 11), *Retail Clerks Union, Local 770* v. *NLRB*, D.C. Cir., 296 F.2d 368 (1961) challenges the validity of the Sixth Circuit's holding herein in its appropriate recognition that where a union seeks "to remove the economic incentive for contracting out", it thus endeavors "to preserve the work for the contracting employees" (p. 374). *Accord*: *Int. Union, UMWA, et al.*, 188 NLRB No. 121, 76 LRRM 1395.

Additionally, the Court will recall the district court's finding, with reference to Riverton, that Riverton produced more with its own employees than it had produced previously, noting "This record does not explain why financial ability to expand production (1964-65) was missing in 1962-63" (A. 13a).

Moreover a further challenge to the Sixth Circuit's attributing to the challenged clauses a "secondary boycott" status (A. 79a) and to Riverton's nonsignatory suppliers a "boycotted employers" status (A. 71a) is *National Woodwork's* holdings that Section 8(e) is not subject to literalism (386 U.S. 619-25) and that the Act's Section 8(b)(4) is "not to be read as supporting a construction of the statute *as prohibiting the incidental effects of traditional primary activity*" (p. 632). *Teamsters, Local 710* v. *NLRB*, 335 F.2d 709, 713-14, consistent with *National Woodwork*, declares "Incidental secondary effects of such activity and agreement do not render them illegal" and "Thus, the 'cease doing business' language

in §8(e) cannot be read literally because inherent in all subcontracting clauses, even those admittedly primary, is refusal to deal with at least some contractors". *Accord:* 73 Harvard L. Rev. 1086, 1119; 62 Mich. L. Rev. 1176, 1187 (May, 1964) [See Appendix D herein, p. 87a].

NLRB's variant conclusions concerning the 80-cent clause have been detailed (*ante*, pp. 32-34); and while the Sixth Circuit accurately noted that NLRB "has not been consistent in its rulings on either the eighty-cent or the PWC clause", as well as its recital of the ultimate validation thereof by NLRB (A. 73a), it omitted a crucial fact that in refusing NLRB's invalidation of the 80-cent clause, the District of Columbia Circuit's *Int. Union, UMWA* v. *NLRB, et al.*, 399 F.2d 977, 980, declared that "Since the 80-cent clause is by everyone's admission and our characterization a substitute for the union standards clause" (*ante*, p. 33) and, as already noted, plaintiffs' Dan S. Davison was an intervenor therein, so that the phrase, "everyone's admission" included plaintiffs' intervenor Davison. In any event, the fact remains that both the District of Columbia Circuit in *Lewis, et al.* v. *NLRB*, 350 F.2d 801 (1965), and NLRB in *Int. Union, UMWA, et al.*, 183 NLRB No. 121, 76 LRRM 1394, 1395 (1971), have characterized the 80-cent clause as a union standards clause and both have regarded the clause as permissive under Section 8(e) in *Int. Union, UMWA* v. *NLRB, et al.*, D.C. Cir., 399 F.2d 977, 980 (1968) and *Int. Union, UMWA, et al., supra*, at p. 1396.[10]

Moreover, the Sixth Circuit's express preference for

[10]Both PWC and the 80-cent clause are scheduled for argument in the District of Columbia Circuit on May 25, 1972 in Case No. 23,947, styled *Dixie Mining Co., Pet.* v. *NLRB, Resp. and W. A. Boyle, et al., Intervenors;* Case No. 21,129, styled *Int. Union, UMWA, et al., Pet.* v. *NLRB, Resp. and Dan S. Davison, et al., Intervenors;* and Case No. 21,226, styled *NLRB, Pet.* v. *BCOA, Resp. and Int. Union, UMWA, et al., Intervenors.*

prior Board decisions conflicts with this Court's *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), that "The administrative interpretation of the Act by the enforcing agency is entitled to great deference."

The Sixth Circuit's failure to follow this Court's previous enunciations and its conflicts with rulings and indicia of the District of Columbia Circuit and with NLRB's rulings concerning the challenged clauses, stress the importance of this Court's award of certiorari herein.

B. THE SIXTH CIRCUIT'S REVERSAL OF THE DISTRICT COURT'S FINDINGS THAT THE CHALLENGED CLAUSES WERE PERMISSIVE UNDER THE ACT'S SECTION 8(e) CONFLICTS WITH RULE 52(a), FEDERAL RULES OF CIVIL PROCEDURE.

Under Rule 52(a), Federal Rules, "Findings of fact shall not be set aside unless clearly erroneous". This Court's *Comm'r. of Internal Revenue* v. *Duberstein*, 363 U.S. 278, 291, as well as the Sixth Circuit's *Bale* v. *Glasgow Tobacco Bd. of Trade, Inc.*, 330 F.2d 281, 287 and *General Electric* v. *Sciaky Bros.*, 415 F.2d 1068, have given judicial recognition to Rule 52(a)'s command.

The Sixth Circuit's conflict with the Rule and the cited cases, UMW submits, warrants the award of certiorari herein.

C. THE SIXTH CIRCUIT'S HOLDINGS WITH REFERENCE TO UMW'S RESPONSIBILITY FOR THE WORK STOPPAGES CONTRAVENE PRIOR IMPORTANT DECISIONS AND PRINCIPLES OF THIS COURT AND OTHER FEDERAL COURTS, INCLUDING PRIOR DECISIONS OF THE SIXTH CIRCUIT.

The Sixth Circuit premised its holding that UMW was responsible for the 1964 work stoppage on the ground that District 17's field representative Emery McCoy and other UMW agents knew that UMW members had a tradition of "no contract, no work" and "To tell them that they had no contract was the 'signal' for them to strike" (A. 72a). Although the district court had found UMW

not responsible for the 1966 stoppage, the Sixth Circuit held such findings "not supported by evidence" and "clearly erroneous" (A. 75a), and premised its liability holding on the ground that UMW did nothing to persuade its members to return to work other than to send them a telegram and, in failing to discipline the strikers "Its inaction was a form of influence and persuasion" by which UMW benefited (A. 74a); and that Local 1209 was not an autonomous labor organization separate and apart "for UMW" but "an administrative arm" of, "and was supervised, dominated and controlled by UMW" with the right "to reverse the action of the Local Union" (A. 75a). UMW discusses these grounds *seriatim:*

1. The 1964 Stoppage.

Ever since the *Coronado cases*,[20] federal courts have regarded labor unions as entities distinct from union membership. Similarly, *U. S.* v. *White*, 322 U.S. 694, distinguished union membership from the union as an entity. In defining the term "agent" in the Act,[21] Congress intended to adopt the common law rules of agency, as held in *Harnischfeger Corp.* v. *Sheet Metal Workers, etc.*, 6 Cir., 436 F.2d 351 (1970)—a Section 303 action.

In *first Coronado* (259 U.S. 395), proof of "actual agency" was declared a prerequisite to union responsibility. The Act's chief proponent, Senator Taft, declared, "The fact that a man was a member of a labor union . . would be no evidence whatever to show that he was an agent".[22] *Int. Ladies Garment Workers Union* v. *NLRB*, D.C. Cir., 237 F.2d 545, 551, held that "Imputation of the

[20] *UMWA* v. *Coronado Coal Co.*, 259 U.S. 344, 387, 391; *Coronado Coal Co.* v. *UMWA*, 268 U.S. 295, 304-05.

[21] The Act's Section 301(e) [29 USCA 185(e)] and 2(13) [29 USCA 152(13)] appear in Appendix C hereto (A. 81a, 85a).

[22] See Legislative History of the Labor Management Relations Act, 1947 (Government Printing Office, 1948), p. 1204.

acts of one person to another" is forbidden "except when the one is acting as agent for the other."[23]

Since there is no claim that UMW authorized or participated in the 1964 stoppage, relevantly Section 303's legislative history,[24] as well as the federal judiciary's interpretation of the Act's "agency" definition, negates a parent organization's liability for wildcat strikes. As stated in *United Construction Workers* v. *Haislip Baking Co.*, 4 Cir., 223 F.2d 872, 877, "*We have never held, however, that there is any responsibility on the part of a union for a strike with which it has had nothing to do: and there manifestly is no such liability . .*" *Walters* v. *Int. Assn. of Plumbers*, 6 Cir., 323 F.2d 578, rejected a judgment against a parent organization because "There is no evidence . . that [the parent organization] participated in any way in the placing of the picket or ratified the picketing" and, therefore, "The judgment against it has no support".

The Sixth Circuit's opinion cites no judicial authority for its theory that advising Riverton employees "they had no contract was the 'signal' for them to strike" because of UMW's tradition of "no contract, no work", but its holding conflicts with this Court's *Coronado*, the Sixth Circuit's *Harnischfeger* and the Act's legislative history, all showing congressional and judicial policy to regard unions as legal entities and as juristic persons, separate and apart from their membership, and conjoining to challenge the employment of the Sixth Circuit's principle where unrefuted evidence affirmatively demonstrates

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[23]Accord: *NLRB* v. *Miami Coca-Cola Bottling Co.*, 5 Cir., 222 F.2d 341; *NLRB* v. *Marshall Car Wheel, etc.*, 5 Cir., 218 F.2d 409, 417.

[24]Legislative History of the Labor Management Relations Act, 1947 (Government Printing Office), Vol. II, p. 1627, 93 Congressional Record A. 3233. See also Senator Taft's statement, "The President says that a union will be liable if any of its members engaged in an unauthorized wildcat strike. *This is simply not so.*"

efforts to have Riverton employees return and continue to work (J.A. 1065-69) and uncontradicted evidence is that strike action was voluntary on the part of Riverton employees (*ante*, pp. 16 *et seq.*).

Even though, as the Sixth Circuit noted, the district court characterized the testimony of the two McCoys (*ante*, pp. 17-19) as "less than candid" (A. 73a), the absence of any variant testimony of necessity invites this Court's recall of principles followed in *C. & O. Ry. Co.* v. *Martin*, 283 U.S. 209, 219-20, that:

> "It is not proper to submit uncontradicted testimony to a [factfinder] for the sole purpose of giving the [factfinder] an opportunity to nullify it by discrediting the witness, when nothing more than mere interest in the case exists upon which to discredit such witness . ."

and *Moore* v. *C. & O. Ry. Co.*, 340 U.S. 573, 578, that "Speculation cannot supply the place of proof". Indeed, *Pennsylvania R. Co.* v. *Chamberlain*, 288 U.S. 333, 340-41, precludes use of inferences as proof where there is "uncontradicted testimony of unimpeached witnesses . . that the fact sought to be inferred did not exist". The Tenth Circuit in *Browning* v. *Crouse*, 356 F.2d 178, expresses it thus:

> "Unimpeached, positive testimony may not be disregarded, even though adduced from interested witnesses, *and no question of credibility or issue of fact is presented for determination by a trier of fact*".

2. The 1966 Stoppage.

The Sixth Circuit's ground for holding UMW responsible for the 1966 stoppage, namely, that "It did not undertake to discipline the strikers" and "Its inaction was a

form of influence and persuasion" (A. 74a) violates this Court's *UMW* v. *Gibbs*, 383 U.S. 715, 739, holding "*There can be no rigid requirement that a union" disavow strike activity which it had not authorized*, and the declaration in Mr. Justice Harlan's concurrence that *a union's failure "to take affirmative action to dispel misconduct are not in themselves proof of authorization or ratification of the wrongdoing"* (p. 743).[25] Further, *Ladies Garment Workers* (237 F.2d 552) cites *first Coronado* (259 U.S. 395) as support for its holding there is no need for disavowing misconduct by a party which has not initiated or participated therein: *"silence provides no rational basis for inferring"* UMW acquiescence in the stoppages.

This Court's *first Coronado* rejected the Sixth Circuit's theory and records a coal company's contention (259 U.S. 371, 66 L. Ed. 975, 981) that where union officers and members, of whom the union has disciplinary control, in the course of a strike, do illegal acts in furtherance of the union cause, the fact that the union takes no affirmative and public action disapproving what they have done, and suspending or expelling them from membership, is of itself the strongest kind of evidence that the acts were authorized or connived at by the union, and that they were done on the union's behalf and for its benefit. But this conduct was rejected by *first Coronado*, which held "We do not conceive that such responsibility is imposed on the national body" that *"it is not a question of contract or of holding out an appearance of authority on which some third person acts"* but *"It is a mere question of actual agency, which the constitutions of the two bodies settle conclusively"* (259 U.S. 395).

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[25]This discussion is equally apposite to the 1964 strike situation in light of the Sixth Circuit's holding that UMW's inaction induced and encouraged the 1964 strike, as well as the 1966 strike (A. 74a).

Even though in *first Coronado* UMW's president had reported to UMW's Executive Board his sympathy with the purpose of the local union's strike, the Court declared this did not "imply or prove on his part any prior initiation, or indicate a desire to ratify the transaction as his work"; that *"It would be going very far to consider such actions of the president alone a ratification by the International Board, creating liability for a past tort"*; that *"The president had not authority to order or ratify a local strike"* and that *"Only the board could do this"—action which the board did not take* (259 U.S. 394).

Additionally, the Sixth Circuit grounded UMW responsibility for the 1966 stoppage on the theory that "Local 1209 was not an autonomous labor organization separate and apart for UMW" but "an administrative arm" thereof and was supervised, dominated and controlled by UMW (A. 75a). This holding is challenged by undisputed evidence and the district court's finding that under UMW's Constitution, local union officers are elected by secret ballot of local union members and local union officers are paid from dues allocated to a local union pursuant to UMW's Constitution; that regular local union meetings are scheduled pursuant to by-laws of local unions; and special meetings are called either by the local union's president or members thereof who request the special meeting called (A. 29a).

It is in conflict with the Sixth Circuit's holding in *Harnischfeger Corp.* v. *Sheet Metal Workers, etc.*, 436 F.2d 351 (1970)—a Section 303 action—that a parent organization is not liable for picketing *by a local union* where it did not authorize picketing and its representatives did not assert authority to terminate the picketing.

Since the Sixth Circuit indicated the applicability

herein of *Int. Bro. of Teamsters* v. *Humko*, 6 Cir., 287 F.2d 231, it is relevant that in *Harnischfeger* the Sixth Circuit pointed out that in *Humko* it "relied in part upon the provisions of the international union's constitution in finding that the international participated as a 'principal actor' in the secondary boycott there in question" (p. 355).

The Sixth Circuit's holding concerning Local 1209 is at variance with its *Harnischfeger* and *Garmeada Coal Co.* v. *Int. Union, UMWA*, 6 Cir., 230 F.2d 945, affirming 122 F.Supp. 512, 518, but it also conflicts with the District of Columbia Circuit's *Busby* v. *Electric Util. Employees' Union*, 147 F.2d 865, the Seventh Circuit's *Morgan Driveway, Inc.* v. *Teamsters*, 268 F.2d 871 (1959). It likewise is challenged by *T. S. Ragsdale Co. Inc.* v. *General Drivers, etc., Local No. 509 and Int. Bro. of Teamsters*, DC, D. S.C., 1972, F.Supp. , 79 LRRM 2219, which, recognizing *Coronado's* doctrine that "subordinate bodies are entities apart from the parent" (p. 2222), noted that NLRB "has consistently recognized the separate features of the two entities" (p. 2223), and quoted in part from *Franklin Electric Construction Cooperative*, 121 NLRB 143, 145-46, that NLRB wrote

> " 'The overwhelming weight of judicial authority, including the Supreme Court of the United States, is that a local union is a legal entity apart from its international . .' " (p. 2223).[26]

While the Sixth Circuit regarded the district court's exoneration of UMW for the 1966 stoppage as being clearly erroneous, it is noteworthy that its opinion did not dispute, factually or otherwise, a single finding upon which that exoneration was based, including the district court's corroboration by the United States Department

[26]For other holdings disparate to the Sixth Circuit's holding herein, see *Ragsdale*, 79 LRRM 2223.

of Labor (*ante*, p. 24). Hence, it is manifest the Sixth Circuit's reversal was based upon legal principles which have been demonstrated to be wholly erroneous.

Lack of consistency in the Sixth Circuit's implementation of the Act's agency provisions and its conflict with its own and with other appellate courts' implementation thereof invite the award of certiorari herein. *Goldlawr v. Heiman,* 369 U.S. 463 (1962).

D. THE SIXTH CIRCUIT'S HOLDING THAT DAVISON IS A PROPER PARTY PLAINTIFF TO THE INSTANT ACTION IS ERRONEOUS.

The Act's Section 303(b) provides that "Whoever shall be injured in his business or property by reason of subsection (a) may sue therefor in any district court of the United States . . and shall recover the damages by him sustained and the cost of the suit" (A. 85-86a).

Undisputed facts show that Riverton is a wholly-owned subsidiary of Davison, and that Davison's President is Dan S. Davison and Riverton's Vice President; but Davison's primary business during 1955-1968 was exclusive sales agent for Riverton's coal on a commission basis and keeping Riverton's books. It is conceded that Davison produced no coal, participated in no collective bargaining with UMW and executed no UMW contracts (*ante*, p. 7). Further, Davison owned none of Riverton's leased properties (A. 3a). Davison's 10 employees were represented by District 50, with whom it had entered into a collective bargaining agreement (A. 4a). As the district court found (A. 32a), while prior to January 1, 1964 purchased coal was loaded and shipped through both the Crown Hill Dock, operated by Riverton, and the Marmet Dock, operated by Davison, after January 1, 1964 almost all coal purchased was shipped through the Marmet Dock, *then operated by Riverton.*

The 1964 and 1966 Agreements' "Application of Contract to Coal Lands" clause provided that (A. 27a):

> "As part of the consideration for this agreement, the Operators signatory hereto agree that this agreement *covers the operation of all of the coal lands, coal producing and coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this agreement, or acquired during its term* which may hereafter (during the term of this agreement) be put into production or use. The Operators agree that they will not lease, license or contract out any coal lands, coal producing or coal preparation facilities for the purpose of avoiding the application of this agreement or any section, paragraph or clause thereof."

Thus, it is evident that under the contract terms to be an "*affiliate*" a party plaintiff must possess the characteristics that would permit it to be an owner, a lessee, licensee or contractee, or a coal producer or operator of a coal preparation facility. Under undisputed facts, Davison was neither: It produced no coal, participated in no UMW bargaining and executed no UMW contract; it owned none of Riverton's leased properties; and during the material period it neither owned nor operated a coal preparation facility; and none of its employees were covered by UMW's contract with Riverton.

Contrary to the Sixth Circuit's sanction of Davison as a party plaintiff herein, in *UMW* v. *Osborne Mining Co.*, 6 Cir., 279 F.2d 716 (1960), Osborne's sales agent, Love & Amos, who was not a coal producer or operator but sold Osborne's coal for which it was paid a commission; and, like Davison herein, had no employees, and particularly none whom UMW sought to organize, or for whom it endeavored to secure a labor contract. *Under*

these circumstances, the Sixth Circuit held UMW did not induce or encourage the sales agent's employees to strike to compel Osborne to bargain with UMW and rejected the sales agency's right to recover as a "whoever" under Section 303 (pp. 727-29).

The issue presented in this discussion has not been, but it is submitted, should be decided by this Court because of its importance in the administration of the Act's Section 303.

CONCLUSION

For the reasons assigned, Petitioner prays that the Petition for Writ of Certiorari should be granted and that the Writ issue to review the Judgments and Opinion of the United States Court of Appeals for the Sixth Circuit entered January 21, 1972, in Cases Nos. 71-1021 and 71-1022, as aforesaid. Petitioner intends to urge each of the questions presented, even if not specifically argued herein.

Respectfully submitted,

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